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3
4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

6 * * *

7 JOSE MENDOZA, JR., et al.,

8 Plaintiff(s),

9 v.

10 AMALGAMATED TRANSIT UNION
11 INTERNATIONAL, et al.,

12 Defendant(s).

Case No. 2:18-CV-959 JCM (NJK)

ORDER

13
14 Presently before the court are three separate motions to dismiss filed by defendants Miller
15 Kaplan Arase, LLP, Anne Salvador, and Alexandra Chernyak (“MKA defendants”) (ECF No.
16 31); Amalgamated Transit Union International, James Lindsay III, Lawrence J. Hanley,
17 Antonette Bryant, Richie Murphy, Keira McNett, Daniel Smith, and Tyler Home (“ATU
18 defendants”) (ECF No. 33); and Keolis Transit America, Inc. and Kelvin Manzanares (“KTA
19 defendants”) (ECF No. 51). Plaintiffs filed a response to each motion to dismiss (ECF Nos. 43,
20 44, 56), to which the MKA, ATU, and KTA defendants replied (ECF Nos. 53, 54, 59).

21 Also before the court is the ATU defendants’ motion for leave to file excess pages. (ECF
22 No. 28).

23 Oral argument has been requested, but it is not necessary in order for the court to resolve
24 these motions.

25 **I. Background**

26 This action arises from the investigation into, and subsequent imposition of trusteeship
27 over, Amalgamated Transit Union Local 1637 (“Local 1637”). The complaint contains the
28 following allegations:

1 Plaintiff Jose Mendoza was the president of Local 1637, which is a local union that is
2 affiliated with Amalgamated Transit Union International (“ATU International”). (ECF No. 8).
3 The remaining plaintiffs in this action consist of Robbie Harris, Robert Naylor, Myeko Easley,
4 Dennis Hennessey, Gary Sanders, Linda Johnson-Sanders, and Ceasar Jimenez. *Id.* These
5 plaintiffs held various positions on the former Local 1637 executive board. *Id.*

6 Between 2010 and 2016, Mendoza had multiple disputes with ATU International, many
7 of which revolved around the appropriate way to read Local 1637’s bylaws. *Id.* Two primary
8 disagreements between Mendoza and ATU International concerned the appropriate rate of pay
9 for the president of Local 1637 and whether the president could designate the secretary-treasurer
10 position as less than full-time. *Id.*

11 In August 2016, Local 1637 entered into an agreement with Miller Kaplan Arase, LLP
12 (“Miller Kaplan Arase”), a certified public accounting firm, to conduct an audit of Local 1637.
13 *Id.* The individual auditors, Chernyak and Salvador, engaged in communications with plaintiffs
14 Home and Lindsay (without informing Local 1637) to produce the audit report. *Id.* The audit
15 report was used by the ATU defendants to support ATU’s own audit, discussed below. *Id.*

16 On March 10, 2017, Home, an internal auditor, and Lindsay, international vice president
17 of ATU International, produced an internal audit report of Local 1637. *Id.* The report found that
18 Mendoza was overpaid and had committed financial malfeasance. *Id.* On April 10, 2017,
19 Hanley, the international president of ATU International, removed plaintiffs from their positions
20 by imposing a trusteeship over Local 1637. *Id.* On June 24, 2017, the ATU International
21 general executive board ratified the trusteeship. *Id.*

22 Mendoza had been previously employed as a coach operator before assuming full-time
23 employment as president of Local 1637. *Id.* After imposition of the trusteeship, Mendoza was
24 directed to present for work as a coach operator with Keolis Transit America, Inc. (“Keolis
25 Transit”), a company with which Local 1637 had previously contracted. *Id.* At this time,
26 Mendoza did not have an active commercial driver’s license (“CDL”), a requirement for this
27 type of work, and was thus unable to commence employment. *Id.* Five days after the trusteeship
28

1 was ratified, Keolis Transit terminated Mendoza “for job abandonment.” *Id.* Mendoza filed a
2 grievance with Local 1637, which was forwarded to Keolis Transit. *Id.*

3 ATU International and Keolis Transit ultimately negotiated a settlement on Mendoza’s
4 behalf that allowed for his reinstatement with Keolis Transit provided that he recertify his CDL
5 “within five (5) business days of the ATU’s receipt of this notice.” *Id.* Mendoza did not accept
6 the settlement. *Id.* At the grievance hearing that followed, defendant Lindsay accepted the
7 settlement on Mendoza’s behalf and without Mendoza’s consent. *Id.* Mendoza’s termination
8 was finalized after he did not recertify his CDL within the time limit set by the settlement. *Id.*

9 On September 22, 2017, Mendoza initiated the first iteration of this action in state court,
10 which was removed to federal court on September 25, 2017. *See Mendoza, Jr. v. Amalgamated*
11 *Transit Union International, et al.*, case no. 2:17-cv-2485-JCM-CWH, ECF No. 1 (“*Mendoza*
12 *I*”). In *Mendoza I*, Mendoza’s complaint set forth ten separate causes of action on behalf of
13 himself as an individual, and on behalf of Local 1637, against the ATU defendants (excluding
14 Murphy): (1) breach of contract regarding defendants’ alleged amending of Article 4 of the Local
15 1637 Constitution and failure to follow procedure in charging Mendoza; (2) breach of contract
16 regarding defendants’ alleged fraudulent contravention of the ATU International Constitution
17 and Bylaws in implementing the trusteeship; (3) breach of implied covenant of good faith and
18 fair dealing; (4) fraudulent misrepresentation; (5) negligent misrepresentation; (6) legal
19 malpractice as to defendants Keira McNett and Daniel Smith; (7) breach of fiduciary duty; (8)
20 constructive fraud; (9) malicious prosecution; and (10) civil conspiracy. *Id.*

21 On May 25, 2018, plaintiffs filed the present action. (ECF No. 1). Plaintiffs initially
22 named as defendants ATU International, Lindsay, Hanley, Bryant, Murphy, McNett, Smith, and
23 Home. *Id.* On July 13, 2018, plaintiffs filed an amended complaint, adding thirteen (13) new
24 causes of action and naming as defendants the MKA and KTA defendants. (ECF No. 8).
25 Plaintiffs’ amended complaint asserts twenty-seven (27) causes of action in total. *Id.* These
26 claims are based on various federal and state statutes, including the Labor Management Relations
27 Act (“LMRA”), the Labor-Management Reporting and Disclosure Act (“LMRDA”), and the
28 Racketeer Influenced and Corrupt Organizations Act (“RICO”), among others. *Id.*

1 Now, the MKA defendants move to dismiss the ninth, tenth, thirteenth, nineteenth,
2 twenty-third, twenty-fourth, and twenty-fifth causes of action pursuant to Federal Rule of Civil
3 Procedure 12(b)(6). (ECF No. 31). The ATU defendants move to dismiss all but the twenty-fifth
4 cause of action pursuant to the same. (ECF No. 33). The KTA defendants move to dismiss the
5 sixth, eighth, ninth, and tenth causes of action pursuant to the same. (ECF No. 51).

6 **II. Legal Standard**

7 *a. Motion to dismiss*

8 A court may dismiss a plaintiff's complaint for "failure to state a claim upon which relief
9 can be granted." Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide "[a] short
10 and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P.
11 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While Rule 8 does not
12 require detailed factual allegations, it demands "more than labels and conclusions" or a
13 "formulaic recitation of the elements of a cause of action." *Ashcroft v. Iqbal*, 556 U.S. 662, 678
14 (2009) (citation omitted).

15 "Factual allegations must be enough to rise above the speculative level." *Twombly*, 550
16 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual
17 matter to "state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (citation
18 omitted).

19 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply
20 when considering a motion to dismiss. First, the court must accept as true all well-pled factual
21 allegations in the complaint; however, legal conclusions are not entitled to the assumption of
22 truth. *Id.* at 678-79. Mere recital of the elements of a cause of action, supported only by
23 conclusory statements, does not suffice. *Id.*

24 Second, the court must consider whether the factual allegations in the complaint allege a
25 plausible claim for relief. *Id.* at 679. A claim is facially plausible when the plaintiff's complaint
26 alleges facts that allow the court to draw a reasonable inference that the defendant is liable for
27 the alleged misconduct. *Id.* at 678.

1 Where the complaint does not permit the court to infer more than the mere possibility of
2 misconduct, the complaint has “alleged – but it has not shown – that the pleader is entitled to
3 relief.” *Id.* at 679. When the allegations in a complaint have not crossed the line from
4 conceivable to plausible, plaintiff’s claim must be dismissed. *Twombly*, 550 U.S. at 570.

5 The Ninth Circuit addressed post-*Iqbal* pleading standards in *Starr v. Baca*, 652 F.3d
6 1202, 1216 (9th Cir. 2011). The *Starr* court held,

7 First, to be entitled to the presumption of truth, allegations in a complaint or
8 counterclaim may not simply recite the elements of a cause of action, but must
9 contain sufficient allegations of underlying facts to give fair notice and to enable
10 the opposing party to defend itself effectively. Second, the factual allegations that
11 are taken as true must plausibly suggest an entitlement to relief, such that it is not
12 unfair to require the opposing party to be subjected to the expense of discovery
13 and continued litigation.

14 *Id.*

15 *b. FRCP 9(b) – claims alleging fraud*

16 Allegations of fraud are subject to a heightened pleading standard. *See* Fed. R. Civ. P.
17 9(b) (“[A] party must state with particularity the circumstances constituting fraud . . .”). Rule
18 9(b) operates “to give defendants notice of the particular misconduct which is alleged,” requiring
19 plaintiffs to identify “the circumstances constituting fraud so that the defendant can prepare an
20 adequate answer from the allegations.” *Neubronner v. Milken*, 6 F.3d 666, 671 (9th Cir. 1993)
(citations omitted).

21 “The complaint must specify such facts as the times, dates, places, benefits received, and
22 other details of the alleged fraudulent activity.” *Id.* (citations omitted). Rule 9(b) provides that
23 “[m]alice, intent, knowledge, and other conditions of a person’s mind may be alleged generally.”

24 *Id.*

25 **III. Discussion**

26 Plaintiffs’ amended complaint sets forth twenty-seven causes of action: (1) breach of
27 ATU International’s constitution and general laws in violation of LMRDA safeguards against
28 improper disciplinary action; (2) violation of LMRDA equal rights (pursuant to LMRDA Title I
§ 101, 29 U.S.C. § 411 and 412); (3) violation of LMRDA free speech; (4) breach of ATU

1 International's constitution and general laws in violation of LMRDA trusteeship provisions; (5)
2 violation of LMRDA indirect election provisions; (6) breach of duty of fair representation; (7)
3 violation of LMRDA equal rights (pursuant to LMRDA Title I § 101 and 29 U.S.C. § 411(a)(1));
4 (8) violation of LMRDA prohibition on receiving and accepting something of value from a union
5 employer; (9) wire fraud and mail fraud; (10) federal RICO violation (pursuant to 18 U.S.C.
6 § 1962); (11) LMRA breach of contract; (12) negligence; (13) defamation and defamation *per se*;
7 (14) fraudulent misrepresentation; (15) legal malpractice; (16) breach of fiduciary duty; (17)
8 constructive fraud; (18) malicious prosecution; (19) civil conspiracy; (20) false pretenses
9 (pursuant to Nevada Revised Statutes § 205.380); (21) perjury; (22) offering false evidence; (23)
10 false pretenses (pursuant to Nevada Revised Statutes § 205.377); (24) state RICO violation
11 (pursuant to Nevada Revised Statutes § 207.470 *et seq*); (25) accounting malpractice and
12 professional negligence as to the MKA defendants; (26) accounting malpractice and professional
13 negligence as to defendant Tyler Home; and (27) breach of fiduciary duty.¹ (ECF No. 8).

14 *a. MKA defendants' motion to dismiss*

15 The MKA defendants argue in their motion to dismiss that plaintiffs' ninth, tenth,
16 thirteenth, nineteenth, twenty-third, twenty-fourth, and twenty-fifth claims should be dismissed
17 for failing to state a claim upon which relief can be granted. (ECF No. 31).

18 *1. Ninth cause of action as to MKA defendants*

19 Plaintiffs' ninth cause of action alleges that all defendants conspired to, and in fact did,
20 use wire transmissions and mail services to defraud plaintiffs of their rights guaranteed by the
21 LMRDA. (ECF No. 8). These statutes do not expressly confer a private right of action, and the
22 weight of authority has concluded that no implied private right of action exists. *E.g., Wisdom v.*
23

24 ¹ Claims 1, 2, 3, 4, 5, 7, 11, 12, 14, 16, 17, 18, 20, 22, and 27 are brought by all plaintiffs
25 against the ATU defendants. Claim 6 is brought by plaintiff Jose Mendoza against the ATU and
26 KTA defendants. Claim 8 is brought by all plaintiffs against the ATU and KTA defendants.
27 Claims 9, 10, 13, and 19 are brought by all plaintiffs against all defendants. Claim 15 is brought
28 by all plaintiffs against defendants McNett and Smith. Claim 21 is brought by all plaintiffs
against defendants Hanley, Lindsay, and Home. Claims 23 and 24 are brought by all plaintiffs
against the MKA and ATU defendants. Claim 25 is brought by all plaintiffs against the MKA
defendants. Claim 26 is brought by all plaintiffs against defendant Home.

1 *First Midwest Bank of Poplar Bluff*, 167 F.3d 402, 407–08 (8th Cir. 1999) (no implied private
2 right of action under mail fraud or wire fraud statutes); *Ryan v. Ohio Edison Co.*, 611 F.2d 1170,
3 1178 (6th Cir. 1979) (no implied private right of action under mail fraud statute); *Napper v.*
4 *Anderson, Henley, Shields, Bradford and Pritchard*, 500 F.2d 634, 636 (5th Cir. 1974) (no
5 implied private right of action under wire fraud statute), cert. denied, 423 U.S. 837 (1975).

6 Accordingly, plaintiffs’ ninth claim is dismissed with prejudice.

7 2. *Tenth cause of action as to MKA defendants*

8 Plaintiffs’ tenth cause of action alleges a RICO violation pursuant to 18 U.S.C. § 1962.
9 (ECF No. 8). Specifically, plaintiffs allege that the criminal offenses pleaded in the eighth and
10 ninth causes of action serve as predicate offenses under the RICO statute. *Id.* The MKA
11 defendants’ motion to dismiss asserts that plaintiffs have not sufficiently established that the
12 MKA defendants participated in the management of a RICO enterprise or engaged in a pattern of
13 racketeering activity. (ECF No. 31). Further, the MKA defendants argue that plaintiffs lack
14 standing to assert a RICO claim. *Id.*

15 To survive a motion to dismiss, a federal RICO civil complaint must plausibly allege:
16 “(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity (known as
17 ‘predicate acts’) (5) causing injury to plaintiff’s ‘business or property.’” *Grimmett v. Brown*, 75
18 F.3d 506, 510 (9th Cir. 1996) (citing 18 U.S.C. §§ 1964(c), 1962(c)). Under the *Reves v. Ernst*
19 *& Young* “operation or management” test, to participate in the “conduct” of an enterprise, one
20 must participate in the operation or management of the enterprise itself. 507 U.S. 170, 185
21 (1993). RICO liability is not limited to those with primary responsibility for the enterprise’s
22 affairs, and it is not limited to those with a formal position in the enterprise; one need only play
23 “some part” in directing the enterprise’s affairs for liability to attach. *Id.* at 179.

24 Plaintiffs’ only allegation of RICO conduct by the MKA defendants concerns the reliance
25 of the ATU defendants on the Miller Kaplan Arase audit report. (See ECF No. 8). The mere
26 preparation of an audit report and the nondescript alleged reliance of the ATU defendants upon
27 that report is insufficient to plausibly state that the MKA defendants played at least “some part”
28 in directing the alleged enterprise. See *Reves*, 507 U.S. at 179; see also *Univ. Of Md. at Balt., et*

1 *al. v. Peat, Marwick, Main & Co.*, 996 F.2d 1534, 1539 (3d Cir. 1993) (“Simply because one
2 provides goods or services that ultimately benefit the enterprise does not mean that one becomes
3 liable under RICO as a result. There must be a nexus between the person and the conduct in the
4 affairs of an enterprise. The operation or management test goes to that nexus.”). Moreover,
5 plaintiffs’ allegation that the audit report was defective due to professional misconduct has no
6 bearing on the operation or management test. *Cf. Baumer v. Pachl*, 8 F.3d 1341, 1344 (9th Cir.
7 1993) (holding that whether the professional services at issue were rendered “well or poorly,
8 properly or improperly, is irrelevant to the *Reves* test”).

9 Accordingly, the court will dismiss the plaintiffs’ tenth claim without prejudice as to the
10 MKA defendants.

11 3. *Thirteenth cause of action as to MKA defendants*

12 Plaintiffs’ thirteenth cause of action alleges defamation and defamation *per se*. (ECF No.
13 8). To pursue an action for defamation, plaintiffs must plausibly allege: “(1) a false and
14 defamatory statement ...; (2) an unprivileged publication to a third person; (3) fault, amounting to
15 at least negligence; and (4) actual or presumed damages.” *Clark County School Dist. v. Virtual*
16 *Educ, Software, Inc.*, 125 Nev. 374, 385 (Nev. 2009). If a defamatory communication pertains to
17 a ““person’s lack of fitness for trade, business, or profession,”” or tends to injure the plaintiff in
18 his or her business,” it is defamation *per se* and damages are presumed. *Id.* (citing *K-Mart*
19 *Corporation v. Washington*, 109 Nev. 1180, 1192 (Nev. 1993).

20 Plaintiffs’ defamation claim appears to rely solely on the allegation that “Defendants
21 made a false a [sic] defamatory statements [sic] alleging that Plaintiffs committed a criminal
22 offense of embezzlement of \$144,909.08 in Local 1637 dues money.” (ECF No. 8). Plaintiffs
23 provide no additional support for this allegation, and at no point in the complaint do plaintiffs
24 allege that the MKA defendants published to a third person the allegedly defamatory statement.
25 Because the mere recital of the elements of a defamation claim, absent any factual support, is
26 insufficient to “state a claim to relief that is plausible on its face,” plaintiffs’ thirteenth cause of
27 action is insufficiently pleaded. *See Iqbal*, 556 U.S. at 678 (citation omitted).

1 Therefore, the court will dismiss without prejudice the thirteenth claim as it pertains to
2 the MKA defendants.

3 4. *Nineteenth cause of action as to MKA defendants*

4 Plaintiffs’ nineteenth cause of action alleges civil conspiracy. (ECF No. 8). This claim is
5 nearly identical to the tenth cause of action pleaded in *Mendoza I*. See *Mendoza, Jr. v.*
6 *Amalgamated Transit Union International, et al.*, case no. 2:17-cv-2485-JCM-CWH, ECF No. 1.

7 Where a plaintiff brings a contract claim under Section 301 of the LMRA, any state-law
8 tort claims that are “substantially dependent upon analysis of the terms of an agreement made
9 between the parties in a labor contract . . . must either be treated as a § 301 claim . . . or
10 dismissed as pre-empted by federal labor-contract law.” *Allis-Chalmers Corp. v. Lueck*, 471
11 U.S. 202, 213 (1985).

12 Indeed, where a plaintiff’s contract and tort claims stem from the same facts, the duties
13 and rights at issue in a state-law tort claim “derive from the rights and obligations established by
14 the contract.” *Id.* at 216–217. Thus, a contract claim brought under Section 301 of the LMRA
15 precludes the need for duplicative state-law tort claims.

16 In *Mendoza I*, this court held that Mendoza’s state-law tort claims “relate to the process
17 by which [ATU] International imposed a trusteeship over Local 1637 and removed Mendoza
18 from his position as president of Local 1637.” *Mendoza I*, case no. 2:17-cv-2485-JCM-CWH,
19 ECF No. 30. This court also held that resolution of Mendoza’s state-law tort claims is
20 “substantially dependent upon analysis of the terms of [the relevant] labor contract[s].” *Id.* On
21 this basis, the court dismissed Mendoza’s civil conspiracy claim as preempted by Section 301(a)
22 of the LMRA. *Id.*

23 Here, plaintiffs have, in their eleventh cause of action, alleged a general breach of
24 contract claim under Section 301 of the LMRA. (ECF No. 8). Plaintiffs’ civil conspiracy claim
25 is derived from the same facts that underlie their Section 301 contract claim, and it is essentially
26 the same claim as the civil conspiracy claim brought in *Mendoza I*. Plaintiffs’ nineteenth cause
27 of action is therefore preempted by Section 301(a) of the LMRA.

1 Accordingly, the court will dismiss without prejudice plaintiffs' nineteenth claim against
2 the MKA defendants.

3 *5. Twenty-third cause of action as to MKA defendants*

4 Plaintiffs' twenty-third cause of action alleges, as a Nevada state law RICO predicate
5 offense, the crime of obtaining something of value by false pretenses pursuant to Nevada
6 Revised Statutes § 205.377. (ECF No. 8). Section 205.377 provides that:

7 A person shall not, in the course of an enterprise or occupation, knowingly and
8 with the intent to defraud, engage in an act, practice or course of business or
9 employ a device, scheme or artifice which operates or would operate as a fraud or
deceit upon a person by means of a false representation or omission of a material
fact that:

- 10 (a) The person knows to be false or omitted;
11 (b) The person intends another to rely on; and
(c) *Results in a loss to any person who relied on the false representation or omission,*

12 in at least two transactions that have the same or similar pattern, intents, results,
13 accomplices, victims or methods of commission, or are otherwise interrelated by
distinguishing characteristics and are not isolated incidents within 4 years and in
14 which the aggregate loss or intended loss is more than \$650.

15 Nev. Rev. Stat. § 205.377 (emphasis added).

16 In accepting as true all well-pled factual allegations in the complaint, plaintiffs have
17 failed to plausibly allege an § 205.377 violation. The statute requires not only that the fraud or
18 deceit result in a loss, but also that the loss be attributable to a person who *relied* on the false
19 representation or omission. *See id.* Here, plaintiffs have provided no factual support plausibly
20 evincing that any plaintiff relied on MKA's allegedly false representations to their detriment.
21 Rather, plaintiffs have shown only that the ATU International general executive board and the
U.S. Department of Labor relied on the allegedly false representations in the audit.

22 Because plaintiffs have failed to plausibly allege a necessary element of a Nevada
23 Revised Statutes § 205.377 violation, the court will dismiss without prejudice plaintiffs' twenty-
24 third claim against the MKA defendants.

25 *6. Twenty-fourth cause of action as to MKA defendants*

26 Plaintiffs' twenty-fourth cause of action alleges a violation of Nevada's RICO act
27 pursuant to Nevada Revised Statutes § 207.470 *et seq.*
28

1 To survive a motion to dismiss, a civil complaint under Nevada’s RICO act must
2 plausibly allege three elements: “(1) the plaintiff’s injury must flow from the defendant’s
3 violation of a predicate Nevada RICO act; (2) the injury must be proximately caused by the
4 defendant’s violation of the predicate act; and (3) the plaintiff must not have participated in the
5 commission of the predicate act.” *Allum v. Valley Bank of Nevada*, 109 Nev. 280, 283 (Nev.
6 1993).

7 Of the Nevada RICO predicate acts identified in the twenty-fourth cause of action, only
8 one—obtaining property under false pretenses pursuant to Nevada Revised Statutes § 205.377—
9 pertains to alleged conduct by the MKA defendants. For the reasons discussed in the analysis of
10 plaintiffs’ twenty-third cause of action above, plaintiffs have failed to plausibly allege a
11 § 205.377 violation, and therefore have failed to plausibly allege a violation of a Nevada RICO
12 predicate act. As such, plaintiffs have not stated a plausible claim for relief under the Nevada
13 RICO act.

14 Accordingly, the court will dismiss without prejudice plaintiffs’ twenty-fourth claim
15 against the MKA defendants.

16 *7. Twenty-fifth cause of action as to MKA defendants*

17 The twenty-fifth cause of action alleges accounting malpractice and professional
18 negligence. (ECF No. 8). The MKA defendants argue in their motion to dismiss that plaintiffs’
19 lack standing to bring this claim, and that even if they have standing, they have failed to
20 plausibly allege the elements of a professional negligence claim. (ECF No. 31).

21 Plaintiffs have made no showing of why they, as individual union members, have
22 standing to bring an accounting malpractice and professional negligence claim. Plaintiffs have
23 alleged that “Local 1637 entered into the agreement with [Miller Kaplan Arase] to conduct an
24 independent audit of Local 1637,” which supports standing only for Local 1637 itself. (*See* ECF
25 No. 8). Although plaintiffs assert that they are bringing this claim on behalf of the Local 1637
26 executive board and general membership, plaintiffs have acknowledged that they were removed
27 from office and are no longer members of the executive board. *See id.*

1 Further, plaintiffs have not alleged that any demand was made on the Local 1637
2 executive board, or that they have any other source of authority to bring this claim. Because
3 plaintiffs have not established standing to bring this claim, plaintiffs have failed to plausibly state
4 an accounting malpractice and professional negligence claim upon which relief can be granted.

5 Thus, the court will dismiss without prejudice plaintiffs' twenty-fifth claim against the
6 MKA defendants.

7 *b. ATU defendants' motion to dismiss*

8 The ATU defendants first contend that all of plaintiffs' claims against them should be
9 dismissed because they represent impermissible claim splitting. (ECF No. 33). The ATU
10 defendants assert in the alternative that none of plaintiffs' causes of action plausibly state a claim
11 upon which relief can be granted. *Id.*

12 The claim splitting doctrine bars a party from subsequent, duplicative litigation where the
13 "same controversy" exists. *See, e.g., Single Chip Sys. Corp. v. Intermec IP Corp.*, 495 F.Supp.2d
14 1052, 1057 (S.D. Cal. 2007) (quoting *Nakash v. Superior Court*, 196 Cal.App.3d 59 (Cal. Ct.
15 App. 1987)). To determine whether a suit is duplicative, courts in the Ninth Circuit borrow from
16 the test for claim preclusion. *Adams v. Cal. Dep't of Health Servs.*, 487 F.3d 684, 689 (9th Cir.
17 2007), overruled on other grounds by *Taylor v. Sturgell*, 553 U.S. 880, 904 (2008). But claim
18 splitting, unlike res judicata, does not require a final judgment on the merits in the prior case.
19 *Single Chip Sys. Corp.*, 495 F.Supp.2d at 1058.

20 A district court may exercise its discretion to dismiss a duplicative later-filed action, to
21 stay that action pending resolution of the previously filed action, to enjoin the parties from
22 proceeding with it, or to consolidate both actions. *See Adams*, 487 F.3d at 688; *Curtis v.*
23 *Citibank, N.A.*, 226 F.3d 133, 138–39 (2d Cir. 2000); *Russ v. Standard Ins. Co.*, 120 F.3d 988,
24 990 (9th Cir. 1997). In determining whether a later-filed action is duplicative, a court must
25 examine "whether the causes of action and relief sought, as well as the parties or privies to the
26 action, are the same." *Adams*, 487 F.3d at 688.

27 . . .

28 . . .

1 *1. Same causes of action and relief sought*

2 To determine whether successive causes of action are the same, the court must apply the
3 transaction test: “Whether two events are part of the same transaction or series depends on
4 whether they are related to the same set of facts and whether they could conveniently be tried
5 together.” *Id.* at 689 (quoting *W. Sys., Inc. v. Ulloa*, 958 F.2d 864, 870 (9th Cir. 1992)). The
6 transaction test requires the court to evaluate four criteria:

7 (1) whether rights or interests established in the prior judgment would be
8 destroyed or impaired by prosecution of the second action; (2) whether
9 substantially the same evidence is presented in the two actions; (3) whether the
two suits involve infringement of the same right; and (4) whether the two suits
arise out of the same transactional nucleus of facts.

10 *Costantini v. Trans World Airlines*, 681 F.2d 1199, 1202 (9th Cir. 1982). The “same
11 transactional nucleus of facts” factor is commonly held to be outcome determinative. *Cf. Mpyoyo*
12 *v. Litton Electro-Optical Sys.*, 430 F.3d 985, 988 (9th Cir. 2005).

13 With regard to all plaintiffs, the transaction test factors weigh in favor of finding that
14 *Mendoza I* and *Mendoza II* are the same causes of action with the same relief sought.

15 First, the court holds that the present action will impinge on, and consequently impair,
16 rights or interests that would be established in *Mendoza I*. A finding on the breach of contract
17 claim in *Mendoza I* would, for example, be impaired by a contrary finding as to plaintiffs’
18 eleventh claim in the present action.

19 Second, substantially the same evidence to be presented in *Mendoza I* underlies all of the
20 claims in the present action. Plaintiffs’ claims are predicated on essentially the same evidence as
21 the original ten (10) claims included in the *Mendoza I* complaint. The court holds that the
22 evidence presented in this action is no different than that to be presented in *Mendoza I*.

23 Third, that the LMRA claims of the *Mendoza I* complaint and LMRDA claims of the
24 present complaint establish different rights is not sufficient to differentiate the actions. *See*
25 *Adams*, 487 F.3d at 691 (holding that separate federal statutes “establish[ing] distinct rights
26 enforceable by litigants” are not alone sufficient to differentiate prior and later filed actions).
27 Moreover, the same relief is sought in both suits: compensatory and punitive damages,
28 declaratory relief, restoration of the Local 1637 board, and attorney’s fees.

1 Fourth, *Mendoza I* and *Mendoza II* arise from the same transactional nucleus of facts.
2 The allegations contained in the *Mendoza I* complaint all concern ATU International's
3 investigation into, and subsequent imposition of trusteeship over, Local 1637. The present
4 complaint concerns the exact same facts, with the only differences being the addition of Murphy
5 and the MKA and KTA defendants, and the inclusion of additional claims, all of which are based
6 on the same conduct alleged in *Mendoza I*.

7 Having considered the foregoing factors, the court finds that plaintiffs' suit is based on
8 the same events as those set forth in *Mendoza I*. Therefore, under the claim splitting doctrine,
9 these are the same causes of action with the same relief sought.

10 2. *Same parties or privies to the action*

11 The second determination in assessing whether a successive action is impermissibly
12 duplicative is whether the parties or privies to the action are the same. "A person who was not a
13 party to a suit generally has not had a 'full and fair opportunity to litigate' the claims and issues
14 settled in that suit." *Taylor*, 553 U.S. at 892. In *Taylor*, the Supreme Court stated that "one is
15 not bound by a judgment in personam in a litigation in which he is not designated as a party or to
16 which he has not been made a party by service of process." *Id.* at 893 (quoting *Hansberry v.*
17 *Lee*, 311 U.S. 32, 39 (1940)).

18 The *Taylor* Court enumerated six narrow exceptions to the rule that preclusion only
19 applies to parties and parties by service. *Id.* One such exception in which nonparties qualify as
20 parties for the purpose of a claim splitting analysis applies here.

21 The *Taylor* court held that "'in certain limited circumstances,' a nonparty may be bound
22 by a judgment because she was 'adequately represented by someone with the same interests who
23 [wa]s a party' to the suit." *Id.* at 894 (quoting *Richards v. Jefferson County*, 517 U.S. 793, 798
24 (1996)). A party's representation of a nonparty is "adequate" for preclusion purposes only if:
25 "(1) The interests of the nonparty and her representative are aligned; and (2) either the party
26 understood herself to be acting in a representative capacity or the original court took care to
27 protect the interests of the nonparty." *Id.* at 900 (internal citations omitted). The Ninth Circuit
28

1 has also recognized that adequate representation may sometimes require “(3) notice of the
2 original suit to the persons alleged to have been represented.” *Id.*

3 With regard to Mendoza alone, he is a plaintiff in both *Mendoza I* and *Mendoza II*, and
4 his claims are asserted against the same ATU defendants in both actions, except for Murphy,
5 who is named only in *Mendoza II*. That neither Murphy, or for that matter the MKA or KTA
6 defendants, were named as defendants in the initial action is of no consequence. *Cf. U.S. ex rel.*
7 *Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 249 (9th Cir. 1992) (holding
8 that the naming of additional parties does not eliminate the preclusive effect of a prior judgment
9 “so long as the judgment was rendered on the merits, the cause of action was the same and the
10 party against whom the doctrine is asserted was a party to the former litigation”). Thus, both
11 actions involve the same parties.

12 With regard to the remaining plaintiffs, Mendoza and the other plaintiffs’ interests are
13 aligned—all plaintiffs seek reinstatement to their positions on the Local 1637 board and damages
14 for alleged state and federal law violations resulting from imposition of the ATU International
15 trusteeship. (See ECF No. 8). Mendoza also understood himself to be acting in a representative
16 capacity in *Mendoza I*. In the *Mendoza I* complaint, Mendoza requested “[t]hat this Court
17 determine and declare that the trusteeship over Local 1637 be terminated, and that Mr. Mendoza
18 and the rest of Local 1637’s Executive Board be restored to their positions. *Mendoza I*, case no.
19 2:17-cv-2485-JCM-CWH, ECF No. 1 (emphasis added).

20 Further, the remaining plaintiffs (except Jimenez) appear to have had actual notice that
21 Mendoza was representing their interests in *Mendoza I*, as they all attached declarations
22 supporting Mendoza’s motion for partial summary judgment. *Mendoza I*, case no. 2:17-cv-2485-
23 JCM-CWH, ECF No. 68.19–68.25.

24 All of the remaining plaintiffs are thus subject to the preclusive effect of *Mendoza I* as
25 adequately represented parties.

26 ...

27 ...

28 ...

1 3. *Conclusion*

2 The court holds that the instant action is duplicative of the earlier-filed action, *Mendoza I*,
3 and thus constitutes impermissible claim splitting. The court will therefore dismiss plaintiffs'
4 amended complaint with prejudice as it pertains to the ATU defendants.

5 c. *ATU defendants' motion for leave to file excess pages*

6 The ATU defendants have also moved for leave to file excess pages, so as to file a thirty-
7 six (36) page motion to dismiss plaintiffs' amended complaint. (ECF No. 28). Having now
8 dismissed the ATU defendants pursuant to the foregoing, this motion is dismissed as moot.

9 d. *KTA defendants' motion to dismiss*

10 The KTA defendants first argue in their motion to dismiss that plaintiffs' sixth and eighth
11 claims should be dismissed as time barred under the National Labor Relations Act ("NLRA")
12 and as precluded under the LMRA. (ECF No. 51). Second, the KTA defendants contend that
13 plaintiffs' sixth, eighth, ninth, and tenth claims fail to state a claim upon which relief can be
14 granted. *Id.*

15 1. *Sixth cause of action as to KTA defendants*

16 As it pertains to the KTA defendants, the sixth cause of action's demand for damages,
17 brought solely by Mendoza, may be properly brought only against Keolis Transit, as
18 Manzanares, an individual union member, cannot be sued for damages under Section 301(a) of
19 the LMRA. *See SEIU v. Nat'l Union of Healthcare Workers*, 598 F.3d 1061 (9th Cir. 2010).
20 Accordingly, the sixth cause of action is dismissed as to Manzanares.

21 However, Mendoza cannot maintain this claim against Keolis Transit either because it is
22 barred by the applicable statute of limitations. A 12(b)(6) motion to dismiss may raise a statute
23 of limitations defense where the statute's running is apparent on the complaint's face. *Jablon v.*
24 *Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir. 1980).

25 The sixth cause of action alleges a hybrid fair representation/29 U.S.C. § 301 claim,
26 which is subject to a six-month limitations period. *See Del Costello v. Teamsters*, 462 U.S. 151,
27 163–164 (1983) (holding that in an action against both a union for breach of its duty of fair
28 representation and against an employer for breach of contract, the six-month statute of

1 limitations from the NLRA, section 10(b), applies); *Pencikowski v. Aerospace Corp.*, 340 F.
2 App'x 416, 417–18 (9th Cir. 2009) (same). This hybrid claim is asserted against both a union
3 (ATU International) and Mendoza's employer (Keolis Transit), so it must satisfy section 10(b).

4 The parties dispute the appropriate accrual date for Mendoza's hybrid fair
5 representation/29 U.S.C. § 301 claim, but none of the potential options avoid the statute of
6 limitations bar. This action was initiated on May 25, 2018, approximately eleven (11) months
7 after Mendoza concedes that he had actual notice of termination of his employment with Keolis
8 Transit, and approximately ten (10) months after Mendoza concedes he had actual notice of the
9 alleged misconduct of the KTA defendants during the grievance process. (*See* ECF Nos. 1, 8).
10 And in Mendoza's response to the KTA defendants' motion to dismiss, he concedes that he had
11 actual notice of the denial to arbitrate his grievance on September 5, 2017, approximately nine
12 (9) months before this action was filed. (ECF No. 56).

13 In taking the factual allegations contained in the complaint as true, the court concludes
14 that Mendoza's sixth cause of action is time-barred under the applicable statute of limitations.
15 Accordingly, the court will dismiss with prejudice the sixth cause of action as it pertains to the
16 KTA defendants.

17 *2. Eighth cause of action as to KTA defendants*

18 The eighth cause of action's demand for damages, brought by all plaintiffs, is based upon
19 an alleged violation of 29 U.S.C. §§ 186(a)(2) and 186(d)(1). (ECF No. 8). Monetary damages
20 are unavailable under this section; only injunctive relief may be obtained. *Souza v. Trustees of*
21 *W. Conference of Teamsters Pension Trust*, 663 F.2d 942, 945 (9th Cir. 1981) ("Nowhere is it
22 shown that the section [29 U.S.C. §186] intended to provide anything more than injunctive
23 relief."). Thus, the court will dismiss without prejudice plaintiffs' eighth cause of action.

24 *3. Ninth cause of action as to KTA defendants*

25 As is discussed above, no private right of action exists for claims alleged under 18 U.S.C.
26 §§ 1341, 1343, or 1346. Thus, with regard to the KTA defendants, the ninth cause of action will
27 be dismissed with prejudice.

28 . . .

1 4. *Tenth cause of action as to KTA defendants*

2 Plaintiffs' tenth cause of action alleges a RICO violation pursuant to 18 U.S.C. § 1962.
3 (ECF No. 8). The KTA defendants' motion to dismiss asserts that plaintiffs have failed to plead
4 with sufficient specificity that they were injured by the allegedly improper racketeering activity.
5 (ECF. No. 51).

6 As is stated above, to survive a motion to dismiss, a federal RICO civil complaint must
7 plausibly allege: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering
8 activity (known as 'predicate acts') (5) causing injury to plaintiff's 'business or property.'" *Grimmett*, 75 F.3d at 510 (citing 18 U.S.C. §§ 1964(c), 1962(c)). Plaintiffs' complaint sets forth
9 twenty-four pages of alleged facts common to all claims, as well as another four pages of
10 allegations to support each element of their RICO claim against the KTA defendants. (ECF No.
11 8). In particular, plaintiffs allege that:

13 ATU International Defendants sought and received assistance from Defendant
14 Keolis to terminate Plaintiff Mendoza in order to use that termination as an
15 affirmative defense to suit and maintain control over Local 1637, a thing of both
16 monetary and political value to the ATU International Defendants. In return, the
17 ATU International Defendants have granted concessions to Keolis in grievances,
18 in bargaining, and in the interpretation of existing CBA provisions that have
19 caused injury [sic] Local 1637 members through lost wages, and contractual
20 benefits.

21 *Id.*

22 Plaintiffs also allege mail and wire fraud as RICO predicate acts (*id.*), which is
23 permissible here. There is no requirement that a private action under § 1964(c) can proceed only
24 where a defendant has been previously convicted of a predicate act. *Sedima, S.P.R.L. v. Imrex*
25 *Co., Inc.*, 473 U.S. 479, 488 (1985). Moreover, a RICO predicate act need only involve conduct
26 that is "indictable" under certain federal criminal statutes. *Id.* There is no requirement that the
27 predicate act be enforceable through a private right of action, or that such a right actually be
28 enforced. *See* 18 U.S.C. § 1961.

 These facts and allegations, when read together, sufficiently indicate to the court and the
parties the circumstances that give rise to each of the elements required for plaintiffs' tenth cause
of action. And to the extent plaintiffs' RICO claim alleges fraudulent behavior by the KTA
defendants in engaging in wire and mail fraud, plaintiffs have met their burden under Rule 9(b)

1 to allege facts regarding the persons, places, times, dates, and other details of the alleged
2 fraudulent activity. *See Neubronner*, 6 F.3d at 671.

3 Accordingly, the court will deny the KTA defendants' motion to dismiss the tenth cause
4 of action.

5 **IV. Conclusion**

6 Accordingly,

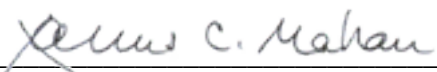
7 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that the MKA defendants'
8 motion to dismiss (ECF No. 31) be, and the same hereby is, GRANTED. With regard to the
9 MKA defendants, plaintiffs' ninth cause of action is DISMISSED with prejudice, and plaintiffs'
10 tenth, thirteenth, nineteenth, twenty-third, twenty-fourth, and twenty-fifth causes of action are
11 DISMISSED without prejudice.

12 IT IS FURTHER ORDERED that the ATU defendants' motion to dismiss (ECF No. 33)
13 be, and the same hereby is, GRANTED. Plaintiffs' first through twenty-fourth, as well as
14 twenty-sixth and twenty-seventh, causes of action against the ATU defendants are DISMISSED
15 with prejudice.

16 IT IS FURTHER ORDERED that the ATU defendants' motion for leave to file excess
17 pages (ECF No. 28) be, and the same hereby is, DENIED as moot.

18 IT IS FURTHER ORDERED that the KTA defendants' motion to dismiss (ECF No. 51)
19 be, and the same hereby is, GRANTED in part and DENIED in part, consistent with the
20 foregoing. With regard to the KTA defendants, plaintiffs' sixth and ninth causes of action are
21 DISMISSED with prejudice, and plaintiffs' eighth cause of action is DISMISSED without
22 prejudice. Therefore, plaintiffs may proceed against the KTA defendants as to their tenth,
23 thirteenth, and nineteenth causes of action.

24 DATED September 5, 2019.

25 
26 UNITED STATES DISTRICT JUDGE